No. 15,064

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
WILLIAM F. HOLCOMB and IDRIS M. HOLCOMB,	*Appellees.*

On Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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PRELIMINARY STATEMENT.

Appellant states on page 6 of its brief that the issue in the case at bar and in *Commissioner v. Ostler,* No. 14,984, is identical and that the basic facts are essentially the same in both cases. We have not been furnished with a transcript of the *Ostler* case and are not familiar with its facts, except as they appear from the decision of the Tax Court[1] and from the Government's brief in the *Ostler* case, a copy of which has

[1]Tax Court Memorandum decision, 1955-207.

been furnished to us by appellant. Since appellant in its brief incorporates by reference the contents of its brief filed in the *Ostler* case, we will discuss the points raised by appellant in its briefs filed in both the *Ostler* case and the case at bar. (We are advised that respondent William G. Ostler is not represented by counsel.)

QUESTION PRESENTED.

On the last day of 1951 there was in effect an interlocutory decree of divorce between appellees, which had been entered on August 30, 1951 by the Superior Court of the State of California. The sole question involved is whether, under the circumstances, the appellees were entitled to file a joint return for the year 1951 pursuant to the provisions of Section 51 of the Internal Revenue Code of 1939.[2]

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved are reproduced in Appendix A to this brief.[3]

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[2]Appellant's statement of the question is objected to, since it *assumes* that appellees were "legally separated" by the interlocutory decree within the meaning of Section 51. In the *Ostler* brief it refers to Mrs. Ostler as taxpayer's "former wife". These are points for the court to consider and decide, since they bear on the issue involved. Appellant's assumption of these facts throughout its briefs results in an inaccurate or colored statement of the issue involved.

[3]All sections, unless otherwise stated, refer to the 1939 Revenue Code.

STATEMENT OF FACTS.

We have only one objection to appellant's rather sparse statement of the facts, all of which were stipulated. Appellant fails to state that even though the interlocutory decree was granted to appellee Idris M. Holcomb, the wife, it awarded to her "neither alimony nor support or maintenance, nor any payment whatsoever . . ." (Stipulated facts, Item 8, R-23.)

SUMMARY OF ARGUMENT.

On December 31, 1951, appellees were not, under California law, legally separated by either a decree of divorce or a decree of separate maintenance within the meaning of Section 51. An interlocutory decree of divorce is not a "decree of divorce" since that term, as used in Section 51 means a *final* decree of divorce. An interlocutory decree of divorce is not equivalent to a decree of separate maintenance, which is a term of well recognized legal content. A decree of separate maintenance is a decree which awards support money to the prevailing party. An interlocutory decree granted to the wife which makes no provision for her support cannot, in any event, be a decree of separate maintenance.

There are several cases squarely in point on the issue involved, all upholding appellees' view. We will show that under California law, which controls the marital status of appellees, the reasoning of these cases is equally applicable to the case at bar and that the judgment of the District Court should therefore be affirmed.

ARGUMENT.

I. LEGAL AUTHORITIES ON ISSUE INVOLVED.

The identical statutory language with which we are concerned is also found in Section 22(k) of the Internal Revenue Code of 1939 which provides in part that certain payments made by a husband to his wife who is *"legally separated from her husband under a decree of divorce or separate maintenance"*[4] are taxable to the wife. The legislative history of Section 51 shows that "the rule with respect to the marital status of an individual legally separated from his spouse under a decree of divorce or of separate maintenance is derived from a corresponding provision in Section 22(k) of the Code, relating to the tax treatment of alimony and like payments" . . . and that "a uniform construction of all these provisions is intended". (S. Rept. No. 1013, 80th Cong. 2d Sess., 1948-1 C.B. 285, 324.)

The courts did give uniform construction to the language involved in all cases in which the interpretation of this language was involved, all upholding appellees' view. We will now discuss these cases:

Marriner S. Eccles, 19 T.C. 1049, affirmed, 208 F. 2d 796 (C.C.A. 4th).

The *Eccles* case involved the identical issue as the case at bar, namely whether a husband and wife who were separated by an interlocutory decree, which was not yet final, could file a joint return under Section 51. The case arose in Utah. The Tax Court, in holding for the taxpayer, reasoned in part as follows:

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[4]Emphasis supplied unless otherwise indicated.

"It is plain that whether the petitioner here meets the basic test imposed by the language set forth above depends upon his marital status as determined by state law for the marital relation. Marriage, its existence and dissolution, is particularly within the province of the states. Since this is so, an examination of the decree here in question is essential to the proper decision of this case. The decree is seen at once to be an interlocutory decree. *Generally it is recognized that an interlocutory decree does not and can not terminate the matrimonial status of the parties.* The Restatement of Conflict of Laws states that after an interlocutory decree of divorce has been granted neither party ceases to be married until the lapse of the given time. However, we must look to the laws of the State of Utah to finally determine the marital effect of the decree entered here between Marriner S. and Maysie Y. Eccles.

. . .

"Under the laws of the State of Utah an interlocutory decree does not end the matrimonial status of the parties, nor destroy the economic and social incidents inherent in marriage."

The court cited in support of its conclusion cases holding that in Utah after the entry of an interlocutory decree, and before it becomes final, the wife retained the right to inherit from the husband's estate, the right to secure letters of administration for the husband's estate, and that an attempted marriage to a third person during the interlocutory period is null and void. The court concluded that under Utah law the taxpayers despite the granting of an interlocutory decree remained husband and wife; and were not then

legally separated under a decree of divorce under Section 51 as the "decree of divorce" contemplated by that Section is a *final* decree.

The court next dealt with the Government's argument that the interlocutory decree should have the same effect as a separation under a "decree of separate maintenance". The court concluded that an interlocutory decree is not a decree of separate maintenance:

> "Like the term 'decree of divorce', the term 'decree of maintenance' is a term of art and carries with a definitive legal meaning.
>
> "Fundamental differences in the nature of the action brought and the relief requested exist in suits for divorce in which an interlocutory decree may be entered and suits for separate maintenance, and on the face of it the decree here involved looked towards a final divorce, not a decree of separate maintenance.
>
> * * * * * * *
>
> "Procedural differences also exist between the two actions. Venue for divorce action lies in the county where the wife resides, while venue for an action of separate maintenance may be either in the county where the wife resides or in any county in which the husband may be found. . . .
>
> "No provision was made in the decree here involved for support or separate maintenance of any kind, . . . It would appear then that the parties were not legally separated under a decree of separate maintenance."

The Tax Court held that the spouses who were legally separated under an interlocutory decree of

divorce, as of December 31, 1949, were for the purpose of Section 51 still husband and wife and thus entitled to file a joint return. The 4th Circuit Court affirmed the decision of the Tax Court in a one paragraph opinion which concludes:

> "We think that the decision of the Tax Court was clearly correct for reasons adequately stated in its opinion." (208 F. 2d 796.)

Alice Humphreys Evans, 19 T.C. 1102, affirmed, 211 F. 2d 378 (C.C.A. 10th).

The question involved the taxability under Section 22(k) of payments made by the husband to the wife during a period following an interlocutory decree but before the decree became final. The interpretation of the same language as contained in Section 51 was involved. The court concluded that while the case arose under a different section of the Code the basic question was decided by the *Eccles* case since under Colorado law, similar to that of Utah, the marital status of the spouses was not changed by the interlocutory decree. The wife was therefore not required to pay tax upon the temporary alimony.

The Commissioner again strenuously argued that the term "decree of separate maintenance" should be construed to include persons separated by an interlocutory decree. The 10th Circuit Court in holding against the Commissioner and in affirming the Tax Court, stated:

> "Obviously, the terms 'separate maintenance' and 'interlocutory decree' as used in Colorado law are not synonymous . . . *Both of these terms have*

specific legalistic meanings, and if Congress had meant to include 'interlocutory decree' in Section 22(k), it certainly would have been a simple matter for it to do so. We agree with the Tax Court that an interlocutory decree under Colorado law is not 'separate maintenance' within the meaning of Section 22(k)."

William G. Ostler v. Commissioner, Tax Court Memo. 1955-207.

This decision involved the identical issue as in the case at bar, in that it not only dealt with the right of spouses to file a joint return after an interlocutory decree has been entered but before it has become final, but it also dealt with an interlocutory decree rendered in California. Plaintiff did not even appear since he was ill. The Tax Court rendered the decision in favor of the taxpayer from the bench, stating that no briefs would be required, since the case came squarely within the holding of the *Eccles* case and *"the fact that in the Eccles case the husband and wife were domiciled in the State of Utah, whereas here they are domiciled in the State of California makes no difference"*. This decision is clearly correct, since, as we will show, the marital status of the plaintiffs after the interlocutory decree but before the entry of the final decree, is under California law identical as under Utah law.

II. STATUS OF PARTIES UNDER CALIFORNIA LAW.

Against the background of these cases we will now show that under California law which controls the marital status of appellees, an interlocutory decree

does not terminate the marriage relationship and that an interlocutory decree is not a decree of separate maintenance.

A. An Interlocutory Decree Does Not Terminate the Marriage Relationship and Is Not a Decree of Divorce.

Here are a few of the innumerable authorities in support of the principle hereinabove stated:

16 *Cal. Juris.,* 2d 412:

> "It is elementary that an interlocutory decree of divorce does not dissolve the marriage. The parties continue to be husband and wife until the entry of the final decree after the lapse of one year."

In Re Dargies Estate, 162 Cal. 51, 112 P. 320:

> "It is the final judgment that grants the divorce. The interlocutory decree does not have that effect . . . In the meantime the parties remain in the legal relation of husband and wife."

Nelson v. Nelson, 7 Cal. 2d 449, 60 P. 2d 982:

> "It is well settled, of course, that an interlocutory decree does not sever the marital bonds."

Remley v. Remley, 49 Cal. App. 489, 193 P. 604:

> "*An interlocutory judgment in a divorce action is not a decree of divorce,* nor does it dissolve the marriage, it is merely a declaration that one of the spouses is entitled to a divorce."

Since the spouses remain husband and wife even after the interlocutory decree has been entered, it has been held that:

1. Upon the husband's death, after the interlocutory decree has been entered but prior to the entry of the final decree, the wife becomes the surviving widow; and where the will of the deceased provided for the division of his estate among his heirs, and the only other heir is the father of the deceased, one-half of the estate is properly distributed to the surviving widow. The above result was reached even though an interlocutory decree had been granted to the deceased husband on the ground of the wife's desertion. (*Estate of Fulton,* 23 Cal. App. 2d 563, 73 P. 2d 644; see also *Cheney v. S. F. Emp. Retirement System,* 7 Cal. 2d 565, 61 P. 2d 754.)

2. The spouse is not denied administration of the other spouse's estate merely because an interlocutory decree of divorce has been secured. (*Seiler Estate,* 164 Cal. 181, 128 P. 334; *Martin Estate,* 166 Cal. 399, 137 P. 2; *Walker Estate,* 169 Cal. 400, 146 P. 868.)

3. A wife may not maintain an action against the husband for a tort occurring after entry of an interlocutory decree but before entry of the final decree, since the interlocutory decree does not sever the marital bonds and the relationship of husband and wife exists until the final decree is entered. (*Paulus v. Bauder,* 106 Cal. App. 2d 422, 235 P. 2d 422.)

4. The marriage of either party contracted within one year after the entry of an interlocu-

tory decree is void. (California Civil Code, Section 61.)

(See also the many other cases cited in West's Annotated Cases to California Civil Code, Sec. 131, Note 4.)

All courts (Circuit Courts, District Court, and Tax Court) which had to pass on this issue have uniformly held that the term "decree of divorce" in Section 51 refers to a final decree which fixes the status of the parties as divorced. An interlocutory decree is not a decree of divorce; it is an inconclusive order; it does not dissolve the marriage; and it does not warrant a serious change of tax consequences.[5] We have also shown that in view of the applicable California law, the reasoning of the *Eccles* and *Evans* cases is squarely in point in the case at bar.

B. An Interlocutory Decree of Divorce Is Not Equivalent to a Decree of Separate Maintenance.

The *Eccles* and *Evans* cases have also held that an interlocutory decree of divorce is not equivalent to a decree of separate maintenance under the law of Utah and Colorado respectively. The same applies

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[5]The Government itself argued successfully that an interlocutory decree does not dissolve the marriage bonds in California, and that therefore salary earned by the husband between the granting of the interlocutory decree and the entry of the final decree is community property, one-half of which is taxable to the wife. The Tax Court upheld this view. (*Ethel B. Dunn*, 3 T.C. 319.) If the marital bonds still exist during the interlocutory period, so as to treat the husband's earnings as community property, then we fail to see how the Government can object to the right of the spouses to file a joint return.

to California and here are some of the many authorities in support of this statement:

1. In a divorce action the domicile of the parties is a jurisdictional requirement. Domicile however is not necessary for a separate maintenance action. Therefore, even a nonresident may maintain in California an action for separate maintenance. (*Wynne v. Wynne,* 20 Cal. App. 2d 131, 66 P. 2d 467.)

2. For a divorce action it is essential that plaintiff must have been a resident of the State for one year, and of the county in which the action is brought for 3 months prior to commencement of the action. (California Civil Code, Section 128.) The residence of plaintiff however need not be alleged or proved in an action for separate maintenance. (*Mattson v. Mattson,* 181 Cal. 44, 183 P. 443.)

3. The purpose of an action for separate maintenance is rather well stated in *Johnson v. Johnson,* 33 Cal. App. 93, 164 P. 421, at pages 96:

> *"The purpose of a suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payment be made at regular intervals for the wife's support."*

(See also *Monroe v. Superior Court,* 22 Cal. 2d 427, 170 P. 2d 473; 16 Cal. Jur. 2d 516.)

In our case it is stipulated that "neither alimony, nor support or maintenance, nor any payment what-

soever" was awarded by the interlocutory decree to the wife. Since the sole purpose of a decree for separate maintenance is to regulate the husband's support duty, such a decree granted to the wife must award her support payments to be made at regular intervals. Since in our case the decree does not contain any provision for any such payment, the interlocutory decree involved cannot possibly be a decree of separate maintenance under California law.

III. REBUTTAL OF POINTS RAISED BY APPELLANT IN ITS BRIEF.

Appellant fails to come to grips with the reasoning of the *Eccles* and *Evans* cases upholding appellees' view, and argues without citing any authorities, that long standing administrative construction of the applicable sections, as well as congressional intent support appellant's view. We will show that this statement is not correct.

1. Administrative Construction of Applicable Code Sections.

In its own Regulations (Reg. 111, para. 29.22(k)-1, see Appendix to this brief) appellant, in interpreting Section 22(k) employed the term "final decree" of divorce. The Tax Court in the *Eccles* case (p. 1053) in referring to these regulations observed that the Government "has made it plain that a decree of divorce refers to a final decree and the word 'final' is hardly used inadvertently, for these regulations repeat its use several times".

Reg. Sec. 29.51-1 (see appendix) state *"A husband and wife occupying the marital status as of the last day of the taxable year may elect to make a joint return . . .* However . . . an individual legally separated from his spouse under a decree of separate maintenance shall not be considered as married." It is obvious that the marital status is determined by state law. We have shown that under California law which controls, appellees occupied the marital status of husband and wife on December 31, 1951, and that they were not legally separated under a decree of separate maintenance on that date. Thus under appellant's own regulations appellees were entitled to file a joint return.

Appellant refers in the *Ostler* brief (p. 10) to a series of rulings on the issue involved. We will show that these rulings are far from consistent.

Soon after the promulgation of the regulations the Commissioner, in I.T. 3761, after remarking that under California law permanent alimony could be ordered by an interlocutory decree, ruled broadly that periodic payments made pursuant to an interlocutory decree of California were deductible by the husband and taxable to the wife.[6] This ruling, which was contrary to the language of the regulations, evidently caused some confusion. In 1949, by I.T. 3934,[7] the earlier I.T. 3761 was modified to provide that where the interlocutory decree provided for tempo-

[6]1945 Cum. Bull. 76.
[7]1949-1 Cum. Bull. 54.

rary alimony during the interlocutory period the temporary alimony was not deductible by the husband or taxable to the wife. Sometime later the Commissioner issued still another I.T. on the subject, I.T. 3944.[8] In this I.T., it was stated that I.T. 3934 did not conflict with I.T. 3761 since periodic payments for the period of the interlocutory decree were not "periodic payments" within the meaning of Sections 22(k) or 23(u) and the modification of I.T. 3761 had been unnecessary.

The above demonstrates that such administrative interpretation of the applicable code sections which exist outside the regulations are confusing and irresolute, and we cannot agree with appellant that the above line of rulings shows "a consistent and long standing administrative construction" consistent with its view. Only the regulations speak in terms of the final decree and have never been altered. The regulations are not only harmonious with common parlance and established legal interpretation, but lay down the only rule which is consistent with the existing court decisions and, as we will show, with congressional intent.

2. Congressional Intent.

Appellant's brief states that congressional intent supports its view. It cites no authority for this statement except certain language found in the Senate Reports accompanying the 1948 Revenue Act which language was set forth verbatim in the *Eccles* case

[8]1949-1 Cum. Bull. 56.

and with regard to which the Tax Court stated (on page 105):

> "This language can hardly be regarded as a congressional directive regarding interlocutory decrees . . . The uniformity of construction requested by Congress in the language quoted above and supported by the respondent in the regulations mentioned, will receive no injury by our holding here."

Since appellant refers to congressional intent, we would like to call the attention of this Court to the following facts which clearly show that the *Eccles* case correctly interpreted the congressional intent on the issue involved:

The Hon. Eugene D. Millikin, Chairman of the Senate Finance Committee, on bringing H. R. 8300 (the bill containing the 1954 Revenue Code) to the Senate floor for debate, made the following statement (June 28, 1954, 100 Cong. Record 8536):

> "H. R. 8300 is the culmination of studies on tax revision extending over a period of nearly 2½ years . . .
>
> "I believe this bill has had the most thorough study and analysis of any tax bill ever presented to the Congress . . ."

This thorough study is also borne out by the fact that the official report of the Senate Finance Committee which accompanied the bill contained the record number of 628 printed pages.

The above indicates that Congress fully discussed the sections contained in the 1954 Revenue Code. On

page 248 of the Senate Finance Committee Report there are discussed (on an issue with which we are not concerned) the following cases: *Commissioner v. Fannie Hirshon Trust* (C.A. 2d May 17, 1954) and *Commissioner v. Estate of Ida S. Godley* (C.A. 3d May 28, 1954). This shows that Congress in enacting the 1954 Revenue Code was fully familiar with the judicial interpretations given to the various Code Sections and considered decisions rendered as late as May, 1954. If Congress did not like certain judicial interpretations the law was changed.

The issue before this Court was decided by the Tax Court in the *Eccles* case on March 11, 1953 and affirmed by the 4th Circuit Court on December 9, 1953. The *Evans* case was decided by the Tax Court in March, 1953 and affirmed by the 10th Circuit Court on March 13, 1954. Thus Congress was fully familiar with the interpretation unanimously given by the courts to Section 51 of the Internal Revenue Code. Yet the identical language of Section 51 of the 1939 Code has been incorporated by the 1954 Revenue Code in Section 6013(d)(2), which reads:

> "An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married."

If Congress had meant to include "interlocutory decree" in this new section, it could easily have done so. The fact that it adopted the identical language in the 1954 Revenue Code as contained in Section 51 of the 1939 Code clearly indicates that Congress

was in full accord with the judicial interpretation of Section 51.

CONCLUSION.

In view of the foregoing, we urge that the decision of the District Court be affirmed.

Dated, San Francisco, California,
May 28, 1956.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
MAX WEINGARTEN,
Counsel for Appellees.

(Appendix A Follows.)

Appendix.

Appendix A

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code of 1939

Section 22. Gross Income.

(k) Alimony, Etc., Income. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

* * * * * * *

Section 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(u) Alimony, Etc., Payments. In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to

be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * * * *

Section 51. Individual Returns.

(b) Husband and Wife.

(1) In General. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * * * * *

(5) Determination of status. For the purposes of this section—

(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(i) if both have the same taxable year—as of the close of such year; and

(ii) if one dies before the close of the taxable year of the other—as of the time of such death; and

(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

* * * * * * *

Treasury Regulations, promulgated under the Internal Revenue Code:

Section 29.22(k)-1. Alimony and separate maintenance payments—Income to former wife. (a) *In general.* * * *

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1). W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending *the final decree.* On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

Example (2). W files suit for divorce from H. In consideration of W's promise to relinquish all marital rights and not to make public H's financial affairs, H makes a legally binding promise in writing to W to pay to her $200 a month if *a final decree* of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered prior to 1942. During 1942, H pays W $200 a month, pursuant to the promise. The $2,400 thus received by W is includible in her gross income under the provisions of section 22(k). Under section 23(u), H is entitled to a deduction of $2,400 from his gross income.

* * * * * * *

Section 29.51-1. Individual returns.

(b) Joint return—(1) *In general.* For taxable years beginning prior to January 1, 1944, a husband and wife, if living together at the close of the taxable year, may elect to make a joint return (see section 51(b)) even though one has no gross income. For taxable years beginning after December 31, 1943, *a husband and wife occupying the marital status as of the last day of the taxable year may elect to make a joint return* even though one of the spouses has no gross income or deductions, and even though the sponses are not living together at any time during the taxable year. *However,* for the purpose of filing a joint return for taxable years with respect to which the amendments made to section 51(b) by section 303 of the Revenue Act of 1948 are applicable (taxable years beginning after December 31, 1947, and taxable years of both husband and wife beginning on the same day in 1947 if at least one of such taxable years ends in 1948), *an individual legally separated from his spouse under a decree of separate maintenance shall not be considered as married.*